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No. 242

In the Supreme Court of the United States

OCTOBER TERM, 1961

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS
DIVISION, A FOREIGN CORPORATION, PETITIONER

v.

OLGA ZDANOK, JOHN ZACHARCYK, MARY A. HACKITT,
QUITMAN WILLIAMS AND MARCELLE KREISCHER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

PETITION OF THE UNITED STATES FOR INTERVENTION

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D.C.

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On October 9, 1961, this Court certified to the Attorney General of the United States that the constitutionality of the Act of July 28, 1953, 67 Stat. 226, 28 U.S.C. 171, is drawn in question in this case.

The Solicitor General, on behalf of the United States, prays that an order be entered permitting the United States to intervene and become a party for the purpose of filing a brief and presenting oral argument, pursuant to 28 U.S.C. 2403, in support of the constitutionality of the statute.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

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OLGA ZDANOK, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF.

CHESTER BORDEAU,
Counsel for Petitioner,
14 Wall Street,
New York 5, N. Y.

WILLIAM P. SMITH,
THOMAS A. HOPKINS,
LAMBERT J. LAMBROS,
WHITE & CASE,

On the brief.

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PETITIONER'S BRIEF.

The opinion and judgment of the United States District Court, Southern District of New York, in favor of petitioner, is reported at 185 F. Supp. 441.

The opinion of Honorable J. Warren Madden, Judge of the United States Court of Claims, sitting by designation in the United States Court of Appeals for the Second Circuit, concurred in by Honorable Sterry R. Waterman, Circuit Judge, reversing the judgment of the Southern District Court and remanding the case for further proceedings not inconsistent therewith, and the dissenting opinion of Honorable J. Edward Lumbard, Chief Judge, are reported at 288 F. 2d 99, 105, and at pages 1 to 12 of the transcript.

Jurisdiction.

The statutory provision conferring jurisdiction on this Court is Title 28 of the United States Code, §1254(1).

On October 9, 1961, this Court entered an order (368 U. S. 814 (1961)) granting the petition for certiorari to the United States Court of Appeals for the Second Circuit limited to question (d) presented by the petitioner

(d) Does participation by a Court of Claims judge vitiate the judgment of the Court of Appeals?

Constitutional Provisions and Statutes Involved.

The pertinent text of the Constitution of the United States, Article I, sections 1 and 8, Article III, sections 1 and 2, and Amendment V, together with that of sections 171, 293a, 1491, 1492, 1494 to 1505, 2509, and 2510, of Title 28 of the United States Code is set forth in the appendix hereto. The Constitutional provisions appear at pages 1a to 4a. The provisions of Title 28 appear at pages 5a to 7a.

The Question Presented for Review.

Does the participation of a United States Court of Claims judge in the hearing and determination of an appeal duly taken to the United States Court of Appeals for the Second Circuit, from a judgment of the United States District Court for the Southern District of New York, in a diversity case within the jurisdiction of said courts in virtue of the judicial powers granted under Article III of the Constitution of the United States, vitiate the judgment of the Court of Appeals?

Statement of the Case.

Respondents commenced this action in the Supreme Court of the State of New York, New York County. The action was removed to the United States District Court for the Southern District of New York upon the ground that that court had jurisdiction by reason of the requisite diversity of citizenship among the parties and the requisite amount in controversy. Each of the five respondents claimed damages for an alleged breach of a collective bargaining agreement between petitioner and the collective bargaining agent of respondents and other former employees of petitioner.

After a trial without a jury (the respondents having waived a jury trial as to the question of liability but reserving the right to trial by jury as to the amount of damages) Honorable Edmund L. Palmieri, the trial judge, ordered judgment for petitioner concluding his opinion by stating:

“In sum, under the circumstances presented in this case, where no relevant limitation on the employer’s freedom of action is found in the agreement or the prior conduct of the parties, no policy of New York law or our national labor laws requires the employer to preserve for its employees seniority status acquired under an expired agreement covering a closed plant.” 185 F. Supp. at page 449.

Respondents thereafter duly presented this case for review to the Court of Appeals for the Second Circuit. The membership of that court was composed of Chief Judge Lumbard and Circuit Judge Waterman of the Second Circuit, and Judge Madden of the United States Court of Claims sitting by designation. The opinion of the court was rendered by Judge Madden who held that respondents had